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Supreme Court U.S.
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No. 01-784

In The

Supreme Court of the United States

UNITED STATES OF AMERICA; UNITED STATES OF AMERICA, ex rel. ROBERT J. NORBECK,

Petitioner,

v.

BASIN ELECTRIC POWER COOPERATIVE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF

IRVIN B. NODLAND
IRVIN B. NODLAND, P.C.
P.O. Box 640
Bismarck, ND 58502-0640
701-222-3030
Attorney of Record
for Robert J. Norbeck

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONSE TO BRIEF IN OPPOSITION

1

On page one of its brief in opposition, Basin asserts the common facilities debt was pooled " . . . in accordance with well accepted accounting practice and with the knowledge of RUS."

Basin owned and operated a number of power plants. Only the "costs" incurred at one of those plants could be billed to Western Area Power Administration ("WAPA") under the operative "cost contract." Pooling of debt between and among a corporation's various "entities" is an acceptable accounting practice for internal accounting purposes but is not acceptable when only "actual costs" from one entity are to be billed. Petitioner presented testimony on the subject from an accounting expert, Dr. Heitger. Basin presented no expert testimony on acceptable accounting principles related to the issues.

The fact RUS, one of Basin's lenders, had knowledge of Basin's internal accounting practices is irrelevant to any issue raised by this petition. Basin's obligation under the operative "cost contract" was to employ accepted principles of accounting using "historical costs". This obligation did not involve any oversight responsibility of Basin's lender, RUS. The trial court accepted Petitioner's position on this point.

2

On page two of its brief, Basin states everyone concurs it was a prudent business decision for Basin to apply the leaseback proceeds to the retirement of its highest debt. The fact a business decision may be "financially prudent" internally for the business making the decision is not justification for violating accepted principles of "cost" accounting in billing under a cost contract. Petitioner presented testimony of an accounting expert on the subject. Basin presented no expert testimony at all.

3

On page two of its brief, Basin asserts that petitioner's computation of the amount of the overcharge was incorrect. There is no explanation for this assertion. Petitioner's computation of the overcharge was made by petitioner's accounting expert using data from numerous exhibits, from courtroom testimony and from the unchallenged factual data contained in an audit report prepared by KPMG.

4

On page three of its brief, Basin states the overcharge to WAPA " . . . was discovered in February of 1993, two years before Petitioner initiated this action, was immediately reported to WAPA, and was refunded to WAPA after the complicated refund calculations were made and verified."

This is a substantial distortion of what actually happened. A challenge to Basin's handling of this contract was made in writing by Petitioner, as a "whistle blower" on January 8, 1993. He had been Basin's Chief Internal Auditor for 12 years. These years included the entire period of the operative contract.

Twenty-one days after Petitioner blew the whistle he was fired in retaliation for his "whistle blowing." Within approximately a week thereafter, Basin contacted WAPA and told its staff Basin had been conducting an examination of its records and had discovered an overcharge. (This was a contract that had been fully expired for over 2 years). Basin advised the matter would be further investigated, the amount of overcharge would be certified by outside auditors and a substantial refund would be forthcoming. Basin then did its own overcharge calculation. It represented that WAPA was entitled to a $2.4 million refund when in fact it should have been $15 million. The record shows that Basin was fully cognizant before this contract ever became operative that its application of sale

lease-back proceeds in the manner it contemplated was going to cause a problem because the billings thereafter would represent a departure from its practice of charging only historical costs on long term power contracts like WAPA's. The WAPA Contract ("Contract") became operative in January of 1986. But on September 27, 1985, three months before the contract even became operative Basin staff circulated an internal memo, which stated:

> "In the 1986 Financial Forecast, it has been assumed that Basin Electric's highest cost notes (including $110 million worth of non-AVS notes) will be retired with the lease proceeds. If this is done it will result in LRS [which was a non-AVS entity and a separate power plant] interest reductions on the Basin Electric cost reportings which may cause problems in accurately pricing power out of Basin Electric resources, as long term contracts [like WAPA's] have historically been based on REA and Basin Electric cost reportings." (Supp App 1)

Thus what Basin said in September of 1985 it was going to do it did in fact for the 5-year period of the contract thereafter. Only after the whistle was blown did Basin scurry to blunt the whistle blowers' impending disclosure by attempting to make it appear Basin had discovered the overcharge on its own. The responsibility it incurred under the False Claims Act came from its additional attempt at deception in claiming the overcharge was only $2.4 million. This is what the trial court found constituted a reckless disregard for the truth.

After the whistle was blown and this false claims action was initiated the United States Department of Justice ("Justice Department") investigated the claims to determine whether it wished to intervene. In the course of this investigation Basin's counsel represented to the Justice Department just how the overcharge had taken place. His representation was exceedingly accurate as a

description of what occurred. Unfortunately this description of what happened has been denied by Basin at all stages of these proceedings thereafter. He wrote:

> "If, however, Basin had applied all of the AVS Unit II leveraged lease proceeds to AVS Unit II outstanding debt, the debt would have been reduced by approximately $100,000,000. This would have reduced the charge to WAPA by its proportion of the interest expense on that debt." (Supp App 2).

In spite of this history Basin had the temerity to advise WAPA that Basin's own staff had "discovered" the overcharge during an examination being conducted for other purposes. Basin falsely advised WAPA that a $2.4 million dollar overcharge had been certified as accurate by Arthur Anderson & Co. something that never happened. Basin then waited two more years before making the actual refund. And as the trial court found WAPA simply accepted the representations of its old friend Basin as true.

Petitioner commenced this *qui-tam* lawsuit within a few weeks of Basin's making that overcharge refund.

On page four of its brief, Basin acknowledges the KPMG audit reported there had been a $15 million overcharge. But Basin asserts that in doing so KPMG " . . . never compared these calculations against actual billings to see what was in fact billed to WAPA." This assertion is contrary to the record. The audit expressly states:

> "The scope of the audit included the following: Gathered and read background documents, including *Basin's billings to Western.*" (Emphasis added) (Supp App 3)

In addition from page six of the audit it is clear the KPMG auditors examined the billings. The report says:

> "We note that throughout the 58 month contract period there was an extensive number of changes to the monthly billings. Some of the changes were noted on the billings, and others were not." (Supp App 4)

In addition on page five of the audit KPMG auditors made an express finding *from the billings* that Basin billed WAPA $197 million over the life of the contract and that $82.7 million of that amount had been a pass through as "lease" costs. (Supp App 5) Beginning with that number the analysis made by petitioner's expert demonstrated to the trial court how the $15 million overcharge was hidden within those "lease costs". The Basin internal memorandum of September 27, 1985, recited above makes it abundantly clear Basin knew in advance its intended billing practice was going to cause this exact problem. However, it chose to proceed to do so anyway. Basin's assertions in its response brief that no one looked at the billings except its own lay witness, Ms. Diesz, is simply not true as the record proves.

In addition to being a false accusation, the making of a claim that "they didn't look at the billings" is truly a smokescreen intended to camouflage the real issues. A mere review of the face of the billing documents would never reveal there had been an interest overcharge. In order to determine there had been an overcharge it was necessary that a detailed analysis be made of the total interest charges made to WAPA. It was also necessary there be an understanding of how the interest costs were essentially hidden in the costs Basin charged WAPA for its share of the lease once lease costs were substituted for interest and depreciation following the sale leaseback transaction. This analysis is what Dr. Heitger did and it is what he presented to the trial judge at trial. In addition to

validating his calculation of the interest overcharge he provided the trial court with an analysis or construct to test his premises and to clearly demonstrate that his calculations were appropriate and accurate. Consequently in its decision the trial court noted specifically in its opinion that Dr. Heitger's analysis of the interest overcharge to WAPA was clear and logical.

On page four of its brief, Basin asserts that as soon as the KPMG auditors learned it had used incorrect assumptions [in finding a $15 million overcharge] they " . . . abandoned this audit issue and the government never pursued it". This assertion is simply not a true statement of what happened. The KPMG auditors who did the on-site examination of Basin's books concluded that its auditing function was impaired by the restrictions Basin imposed upon its auditors as they went about their task of gathering evidence. (Supp App 6) Consequently when they had finished on site, the auditors journeyed to Washington D.C. to the office of Basin's banker, RUS, to see if RUS might happen to have the information they needed to understand how Basin had performed these accounting functions. RUS could not produce the information. But that did not cause the government to move to dismiss this claim. Instead, it referred the claim back to this petitioner to assume responsibility for proof and prosecution. This is permissible under the False Claims Act. Petitioner accepted the expense and burden of further pursuit. Petitioner proved up the claim to the satisfaction of the trial judge and had help in the courtroom from the Justice Department lawyers and witnesses in doing so.

6

On page four of its brief, Basin asserts that petitioner's expert never conducted an independent investigation and claims that Dr. Heitger "conceded" he had done nothing more than check KPMG's arithmetic. This is also clearly not true. KPMG auditors spent three months fact gathering at the home office of Basin Electric. The factual data gathered was reported in an 88-page audit report (plus appendix). The audit report was admitted at trial without objection. At trial, the KPMG auditors reaffirmed the accuracy of the factual data they had gathered. Petitioner's expert relied upon these unchallenged factual reportings. There was no need for petitioner to spend another $300,000 for a second audit to obtain factual data already presented in the unchallenged KPMG audit.

Beyond examining the KPMG audit data, however, Petitioner's expert expended over 400 hours examining over 500 other exhibits. He read the depositions. He sat through the witness's testimony at the trial. The representation made by Basin in its response brief that all he did was check KPMG's arithmetic is patently false and any reading of the record in its entirety so proves.

7

On page five of its brief, Basin returns to its claim that neither KPMG nor Dr. Heitger actually checked Basin's billings to WAPA. Basin asserts: "In a moment of candor at oral argument before the Eighth Circuit, Petitioner admitted that neither KPMG, nor Heitger had examined the billings to WAPA to determine whether KPMG's calculations of a theoretical overcharge had come to reality in the billings." Out of concern for this response on the day following oral argument Counsel addressed a letter to the Eighth Circuit advising that his answer to that question had been in error and he pointed

out where the record established that the billings in fact had been examined. (Supp App 7)

Basin chooses to relay nothing of this history in its response brief even though it knows, for certain, that its position is based upon a misstatement of Counsel made at oral argument and that the misstatement was promptly corrected the following day.

Similarly, it is clear Dr. Heitger proceeded based on information obtained directly from the billings. The only critical thing he needed from the audit for his analysis was the total of the Basin billings to WAPA for lease cost. This number was supplied on page 5 of the KPMG audit and to this day its accuracy has not been challenged. The remaining data Dr. Heitger needed for his analysis, however, was derived from other exhibits. Dr. Heitger accepted KPMG's finding that $82.7 million was billed to WAPA for lease costs. (Supp App 8) Dr. Heitger included this data as a part of his analysis but went on to testify explicitly as to how he had arrived at his conclusion that there had been an overcharge. (Supp App 9, 10 & 11)

On page six of its brief, Basin argues the Eighth Circuit did not review conflicting evidence or the testimony of dueling experts. The irony of this statement is that the Eighth Circuit could not have reviewed the testimony of dueling experts because Basin did not present *any* expert to support its position. Neither did it offer any defense expert to refute the position of petitioner's expert. It is clear that what happened is that the Eighth Circuit assumed the role of expert and pitted its "expertise" against that of petitioner's expert Dr. Lester Heitger.

9

On page seven of its brief, Basin recites the Eighth Circuit's claim that: "There was simply no evidence of an overcharge." At the commencement of its decision the Appeals Court paid homage to the rule of "clear error". Judge Thomas' observation in his dissent in *Hunt v. Cromartie*, 121 S.Ct. 1452, 532 U.S. 234, 149 L.Ed.2d 430 (2001) is especially apropos: "But these incantations of the correct standard are empty gestures, contradicted by the Court's conclusion that it must engage in 'extensive review' ".

While the Eighth Circuit proclaims that it found no evidence it is clear from a reading of its decision that in this case the Court concluded it must engage in an "extensive review" of the evidence. The court simply chose between two conflicting views. One was presented by an expert, Dr. Heitger, the other by Basin's lay witness, Ms. Diesz. The Court rejected Dr. Heitger and accepted Ms. Diesz even though it had no opportunity to view their respective demeanors or adjudge their individual credibility. The Court's announcement that there was *no evidence*, has not served to erase the massive amount of evidence that does exist in the record and upon which the trier of fact relied. It is incredulous that Basin or the Appeals Court could assert there was *no* evidence of overcharge in this record.

In its response brief Basin repeats the Eighth Circuit assertion that petitioner failed to prove that Basin "knew" it was overcharging WAPA. The September 27, 1985, memorandum (Supp App 1), demonstrates that Basin not only should have known but actually knew it was about to depart from its own recognition of historical costs as the basis for billing its cost contracts. Aside from this fact, however it was not necessary Petitioner prove Basin "knew". The trial judge expressly found that Basin acted

in a reckless disregard for the truth. That is all that is needed to support a False Claims Act award.

10

On pages 11 and 12 of its brief, Basin claims that Dr. Heitger's testimony concerning the entity, historical cost, and consistency concepts were presented only as to other claims and therefore have no applicability to the claim now before this Court. This expert did in fact present extensive testimony concerning these accounting principles and they applied across the board to all of the petitioner's claims. Indeed the "entity" concept of accounting was at the very heart of the issue presented by this petition. The entity principle required that costs of power from the power plant supplying WAPA power had to be accounted for and treated separately from costs Basin was incurring at its other power plants. Basin could do what it wanted to do for its own internal accounting needs and practices but under the entity concept and acceptable standards of accounting it was not permitted to "pool" those costs with the costs it was incurring at its other power plants.

CONCLUSION

The record is clear the Eighth Circuit's reversal of the trier of fact was based upon its adoption of conflicting views of the evidence and not upon an absence of evidence to sustain the trial court. This is a violation of the "clear error" doctrine and should be set aside.

Respectfully submitted,

IRVIN B. NODLAND
IRVIN B. NODLAND, P.C.
Attorney for Robert J. Norbeck
P. O. Box 640
Bismarck, ND 58502-0640
701-222-3030

BASIN ELECTRIC POWER COOPERATIVE

MEMORANDUM

TO : Dick Weber

FROM : Howard Easton /s/ Howard Easton

DATE : September 27, 1985

SUBJECT: Debt Retirement Associated With AVS #2 Leveraged Lease Proceeds

---

The ABS #2 leveraged lease negotiations are nearing completion and are anticipated to be finalized November 1, with December 13 being the last possible date for finalization. After the lease closing, I understand that we will be retiring outstanding debt with the lease proceeds. It appears to us, based on the budget work to date, that there are a number of questions concerning the accounting and reporting associated with the AVS #2 leverage lease and the associated Basin Electric debt retirement that need to be addressed.

It is currently estimated that the fair market value of AVS #2 will be approximately $620 million. A breakdown of the expected usage of these funds (based on our 1986 financial forecast work) is shown below:

AVS #2 Leveraged Lease Proceed Usage

FFB Debt Retirement	$485,350,000	(Notes with highest cost savings assumed retired)
Transaction Costs & Penalties	$21,900,000	(Penalties of $7.0 million paid for early retirement)

AVS #2 Bond Assumed	112,750,000
	$620,000,000

In the 1996 Financial Forecast, it has been assumed that Basin Electric's highest cost notes (including $110 million worth of non-AVS notes) will be retired with the lease proceeds. If this is done it will result in LBS interest reductions on the Basin Electric cost reportings which may cause problems in accurately pricing power out of Basin Electric resources, as long-term contracts have historically been based on REA and Basin Electric cost reportings.

We would appreciate the opportunity to discuss with accounting how they intend to handle the leverage lease accounting in order that we can determine how the reportings will affect our power cost pricing methods and budgeting activities prior to the completion of the 1986 operations budget. Since the 1986 budget is presently being prepared we would prefer a meeting the week of September 30, or at the latest the week of October 7.

ms

cc: Orlin Benson
Arnold Ketterling
Wayne Backman
Dan Duhamel

Excerpt From Basin's Letter To Justice Department

Mr. Norbeck's January 18, 1993, reference to issues surrounding MDU and WAPA was so vague as to be of no real assistance to Basin. This was particularly true in light of Mr. Norbeck's earlier strongly stated opinions that the ANG and MDU audit claims were without foundation. Basin cannot even be sure today that Mr. Norbeck was aware of the adjustment Basin ultimately made. Nonetheless, an adjustment was made.

The AVS leveraged lease transaction left Basin with approximately $435,000,000 in sales proceeds to apply to outstanding debt. At that time Basin had debt in various forms and on various terms assigned to various projects. It determined that it was in its best interest to use the leveraged lease transaction proceeds to retire the debt for which it was paying the highest cost, whether or not that debt was specifically related to the AVS project. As a result, approximately $335,000,000 of AVS debt was retired, but the remaining $100,000,000 of the proceeds was used to retire other cooperative debt.

The ANG, MDU, and WAPA contracts called for those entities to pay certain expenses recorded in certain expense accounts. One of those accounts was for lease costs. Another was for interest expense. WAPA was billed and paid for its proportionate share both amounts. If, however, Basin had applied all of the AVS Unit II leveraged lease proceeds to AVS Unit II outstanding debt, the debt would have been reduced by approximately $100,000,000. This would have reduced the charge to WAPA by its proportion of the interest expense on that debt.

When Basin made the decision to retire highest cost debt first, it did not focus on the effect that decision would have on WAPA. Instead, it simply continued to charge WAPA in strict accordance with the contract. Even after management focused on the situation in 1993, it could have maintained a strong argument that the billing practice was permitted by the

* * *

KPMG PEAT MARWICK AUDIT (Page 2)

PART I

APPROACH AND OVERVIEW

INTRODUCTION

At the request of the U.S. Department of Energy, Office of Inspector General (DOE-OIG), KPMG Peat Marwick LLP performed certain agreed-upon audit procedures with respect to possible overcharges on a contract between the Western Area Power Administration (Western) and Basin Electric Power Cooperative (Basin).

The DOE-OIG had received indications that Western may have been overcharged over $30 million for purchases of power from Basin. This information was provided by the former Chief Auditor of Basin who filed a complaint in United States District Court January 12, 1995, alleging fraudulent practices and overcharges due to improper billing and allocation of costs.

SCOPE AND METHODOLOGY

The audit was conducted primarily at Basin's headquarters in Bismarck, North Dakota from May 29, 1996 through August 30, 1996.

The scope of the audit included the following:

- Gathered and read background documents, including contracts, Federal Regulations, audit reports, financial statements, organization charts, Board of Directors minutes, Business Plans, Sale and Leasing Agreements, Agreements between Basin and other business entities, Basin's billings to Western,

supporting accounting documents, correspondence, and allegations as presented by the complainant.

- Determined which costs can be legally charged to Western.
- Determined which Basin charges to Western meet the legal requirements of the Agreements and regulatory requirements and which charges do not meet the Agreements and requirements.
- Ascertained whether refunds are due Western from Basin based on the Agreements and regulatory requirements.
- Performed procedures concerning the following 17 specific issues to determine if there were any overcharges:

    1. Leveraged lease transaction.
    2. Completion and Correction Fund.
    3. Gain on sale of Antelope Valley Station Unit Number 2 (AVS Unit 2).
    4. Lease payment intervals.

* * *

KPMG PEAT MARWICK AUDIT (Page 6)

OBSERVATIONS AND CONCLUSIONS

We found that 12 of the 17 (70 percent) allegations were substantiated or partially substantiated, with estimated overcharges to Western totaling $40,647,806. Addition of interest ($22,955,113) to the overcharges, beginning from the end of the contract (November 1, 1990) through the end of the audit (September 30, 1996),

resulted in a total amount due Western from Basin of $63,602,919. (See Appendix 1 for details.)

We noted that throughout the 58-month contract period there was an extensive number of changes to the monthly billings. Some of the changes were noted on the billings, and others were not. Some of the changes encompassed changes to several prior months on one month's billing. Such a large number of changes made the charges difficult to track, brought into question the reliability of the underlying supporting records, and tendered the majority of the billings potentially questionable.

We also noted that the Board of Directors of Basin represent their membership, independently set rates for electricity,[2] and generally have an incentive to minimize costs and maximize the returns to their membership. This appears to make good business sense from Basin's standpoint. However, those goals seemed to have conflicted with the Western contract which was a contract based on cost. These costs, according to the contract and 7 CFR, should have been just and reasonable, and according to the findings in the report, the costs were not always just and reasonable. Basin appears to have been unjustly enriched at the expense of Western and others – as indicated by prior audit reports by ANG (ANG Coal Gasification Company) and MDU (Montana-Dakota Utilities Company) – both of which had similar cost-type contracts

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[2] Although REA/RUS must approve the rates each year, none of the rates have ever been disapproved.

with Basin and had some of the same types of findings that also affected Western.

*** * * KPMG PEAT MARWICK AUDIT (Page 5)**

the Antelope Valley Station (AVS) located in Beulah, North Dakota (about 100 miles north of Bismarck), which has two units – AVS Unit 1 and AVS Unit 2 – and a capacity of 450 MW in each unit. Western contracted to purchase 185 MW of the 450 MW from AVS Unit 2.

Basin has four major subsidiaries:

Basin Cooperative Services, incorporated in 1981, is a wholly owned, not-for-profit property management subsidiary.

Basin Telecommunications, Inc. is a for-profit subsidiary formed in 1995 and includes a travel agency, dispatch center, internet access, long-distance discounts and cellular plans.

Dakota Coal Company (DCC) is a wholly owned, for-profit subsidiary incorporated in 1988 to provide financing for the Freedom Mine and to purchase the lignite coal produced there. The Freedom Mine, owned and operated by the Coteau Properties Company; supplies lignite for Basin's Leland Olds and AVS stations, Dakota Gasification Company's synfuels plant, and United Power Association's Stanton, North Dakota Station. DCC has a division called Wyoming Lime Producers which owns a lime kiln that began operating in 1993; it produces 400 tons of lime daily for use in dry scrubbers that remove sulfur dioxide from emissions at the AVS and Laramie River stations and at other coal-fired power plants in the region.

Dakota gasification Company (DGC) is a wholly owned, for-profit subsidiary incorporated in 1988 to own and operate the Great Plains Synfuels Plant near Beulah, North Dakota. The plant produces high-Btu natural gas from lignite and byproducts, such as agricultural fertilizers and chemicals from the coal gasification process.

Costs Billed to Western by Basin

During the 58-month contract period, January 1986 through October 1990, Basin billed Western for approximately $197.6 million. The majority of the costs (88 percent) were for four items – lease, fuel, interest, and depreciation – shown as follows (see Appendix 2 for additional cost details):

	Millions	Percent
Lease	$ 82.7	42%
Fuel	45.1	23%
Interest	36.6	18%
Depreciation	10.4	5%
Other	22.8	12%
Total	$197.6	100%

* * *

KPMG PEAT MARWICK AUDIT (Page 3)

5. Coal quantity discount and Meridian royalties.
6. Coal Sales Agreement.
7. Royalties paid on development of Freedom Mine.
8. Imputed interest on development of Freedom Mine.

9. Loan advance to construct secondary crusher at Freedom Mine.
10. Non-refundable down payment for Dragline C.
11. Change in depreciable lives of assets.
12. Deferred depreciation and interest on Common Facilities.
13. Amortization periods and revisions for Common Facilities.
14. August 1987 change in amortization of facilities.
15. Basin's cost allocation system.
16. Cost sharing with basin subsidiaries.
17. Administrative/general and indirect costs allowable.

In order to help gain an understanding of the issues and to determine the validity of the allegations concerning overcharges relating to the above 17 issues, we discussed the allegations with the U.S. Department of Justice trial attorney assigned to the court case and with Western's General Counsel; met with the complainant to clarify the issues; met with Basin representatives to discuss the issues and to coordinate the audit; requested explanations and documents from Basin concerning the issues; and analyzed each of the 17 issue areas based on our discussions with others and on documents made available to us.

The audit primarily covered the period of Western's contract with Basin – January 1, 1986 through October 31, 1990. However, we gathered, read, and analyzed related

and relevant material from 1982 (when the contract was initially signed) through August 30, 1996 (when the audit field work ended).

We considered the audit scope impaired due to Basin essentially limiting our interviews and contacts to only two Basin personnel – Basin's Assistant General Counsel and a Senior Financial Reporting Analyst. Our requests for information and documents were provided to the analyst, who in turn would contact someone, obtain information and documents, and relay the information and documents to us. As a result, we did not have the opportunity to discuss the issues in depth with knowledgeable individuals who were responsible for carrying out work related to the issues we were covering and who possibly could have provided additional information on the audit issues. Also, we did not have the opportunity to obtain documents directly from those individuals, without the documents being pre-screened prior to being made available to us. Consequently, we did not have assurance that we were provided all documents important to the audit issues.

This agreed-upon procedures engagement was performed in accordance with standards established by the American Institute of Certified Public Accountants, generally accepted government auditing standards, and in accordance with Task Plan 96-16 under our contract number DE-AC01-93IG00312 with the DOE-OIG. The sufficiency of these procedures is solely the responsibility of the specified users of the report. Consequently, we make no representation regarding the sufficiency of the agreed-upon procedures either for the purpose for which this

* * *

NODLAND LAW OFFICES

Irvin B. Nodland, P.C.
Chad C. Nodland, P.C.
109 North Fourth Street, Suite 300
P.O. Box 640
Bismarck, North Dakota 58502-0640
TELEPHONE: 701-222-3030 FAX: 701-222-3586

October 19, 2000

Michael e. Gans, Clerk
U.S. Court of Appeals, Eighth Circuit
Thomas F. Eagleton Court House
111 S. 10th St., Room 24329
St. Louis, MO 63102

Re: U.S. ex-rel. Norbeck v. Basin Electric
Appeal No. 99-3216 (Norbeck)

Dear Mr. Gans:

I ask leave of the Court to correct a misstatement of fact I apparently made in my answer to a question from the court during oral arguments on October 18th in St. Paul. I request this letter be distributed to the three panel judges.

The question pertained to whether or not the KPMG auditors and Norbeck's expert reviewed the records of the billings Basin Electric made to WAPA. The correct answer should have been that the KPMP [sic] auditors did review all of the billing records WAPA received from Basin Electric with supporting documents as they attest on pages 2 and 6 of Exhibit 188. The correct answer to the Court's question as pertains to Norbeck's expert, Professor Les Heitger, should also have been that he reviewed all of the billing records and the supporting documents.

I apologize if I gave a misimpression of this by the way I responded to the Court's inquiry.

Sincerely yours,

Irvin B. Nodland

cc: Robert M. Loeb
Benjamin J. Vernia
Gary Hansen
IBN:bjs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

United States of America, ex rel. Robert J. Norbeck, Plaintiff,	)	Civil No. A1-95-003
vs.	)	
Basin Electric Power Cooperative, Defendant.	)	

TRANSCRIPT OF

REBUTTAL TESTIMONY OF LES HEITGER

Taken at
United States Courthouse
Bismarck, North Dakota
March 12, 1999

BEFORE THE
HONORABLE PATRICK A. CONMY – JUDGE

* * *

[2232] Q. (MR. FOX CONTINUING) Did you ever sit down and calculate this out or make this evaluation in any way?

A. The one I just stated?

Q. Yeah.

A. Yes.

Q. Do you have any documentation to reflect how you evaluated it on a mathematical basis?

A. Well, I put it in the record just now, but I do not have a document in front of me.

Q. Do you have any documents in your file that would reflect how you figured this out?

A. It's a very straightforward calculation. It's 16 percent of the total lease payment, which came from the draft audit report of KPMG, which was $82.7 million. So I've relied on the draft audit report in terms of the total amount of the lease payments.

Q. So your computation is based on a percentage of lease payments, it's not based on a computation of interest payments that was actually made to Basin Electric during the course of the contract; is that what you're saying?

A. Yes. What I said was, that was sort of the other side of the equation.

Q. And then as far as the lease, the sale/leaseback transaction is concerned, did you ever make any effort to compute or arrive at the amount of interest and depreciation

* * *

[2230] System of Accounts, imputation of negligence – imputation of interest after the period of construction is improper and then in an aside she made a statement, which I did not fully understand, to the effect that that doesn't mean there's not a way to do it somehow, and it was just plain left at that.

Q. (MR. FOX CONTINUING) And as far as the development of your opinion on this issue is concerned, I

believe that you've just testified that you didn't consult with the RUS about the accuracy or the veracity of your opinion on this issue in any way; isn't that right?

A. I did not directly contact them, no.

Q. Okay. And as far as this – let's go – I want to switch now to the $2.4-million refund issue. Okay. As far as your evaluation of that issue is concerned, you're not claiming that WAPA paid $13 million in excess interest to Basin Electric, are you?

A. I'm claiming that –

Q. Are you claiming that or not?

A. Depends on how you construe what the effect of the lease payment is.

Q. All right. Well, let me ask you this: Just with respect to the narrow issue of interest itself, you are not claiming, as I understand it, that during the course of the transaction WAPA made payments of $13 million of excess interest to Basin?

A. Because of the misappropriation of the $99.6 million the [2231] excess payments that they paid for either interest, if you look at that side of the equation, or lease payments, the makeup of the – a major part of which would be interest, my calculation was $13,225,000, yes.

Q. All right. With respect to actual payments from WAPA to Basin Electric, is it your claim, Dr. Heitger, that during the course of the transaction they wrote out checks as part of the billing for $13 million in excess interest?

A. Excess lease cost or excess interest, depending on which side you look at.

Q. Well, which is it?

A. Well, you can look at either side, I think.

Q. Well, where do you attribute in your analysis? Do you have an analysis that you've done, that you've calculated it?

A. I just stated what the analysis was, $82.7 million, and it was in my original testimony.

Q. Do you have any calculation or documentation to show how you arrived at that conclusion?

A. It's in the record. I just described it.

Q. Do you have any documentation that shows how you evaluated it or calculated that conclusion?

THE COURT: Is there an exhibit setting out damages on that issue?

THE WITNESS: Not from that perspective.

THE COURT: Okay.